

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 CLIFFORD W. MILLER,

Case No.: 3:17-cv-00068-MMD-WGC

4 Plaintiff,

Order

5 v.

Re: ECF No. 27

6 ROMEO ARANAS and the
7 NEVADA DEPARTMENT OF
8 CORRECTIONS,

8 Defendants.

9
10 Before the court is Plaintiff's Motion for Leave to File Second Amended Complaint (SAC),
11 declaration of counsel, and proposed SAC. (ECF Nos. 27, 27-1, 27-2.) Defendant Romeo Aranas
12 filed a response. (ECF Nos. 31, 31-1, 31-2.) Plaintiff filed a reply. (ECF No. 32.)

13 For the reasons set forth below, Plaintiff's motion is granted.

14 **I. BACKGROUND**

15 Plaintiff filed his original complaint and application for leave to proceed in forma pauperis
16 (IFP) on February 2, 2017. (ECF Nos. 1, 1-1.) He was proceeding pro se. The court screened the
17 complaint and dismissed Counts I and II with leave to amend, and dismissed Count III with
18 prejudice. (ECF No. 3.) Plaintiff filed his amended complaint on February 27, 2018. (ECF No. 5.)
19 Plaintiff was allowed to proceed with an Eighth Amendment deliberate indifference to serious
20 medical needs claim against John Does III and IV based on allegations that he has a vision problem,
21 and that these physicians believed surgery might help but did not ask the utilization review panel
22 (URP) to consider it. He was also allowed to proceed with an Eighth Amendment claim against
23 Dr. Aranas based on allegations that Dr. Aranas was aware of a recommendation for Plaintiff to

1 have a consultation with another doctor concerning his eye problem, but did not approve the
2 consultation. All other claims were dismissed. (ECF No. 6.)

3 The parties participated in an early mediation conference, but attempts to settle the case
4 were unsuccessful. (*See* ECF No. 14.) Plaintiff's IFP application was granted, and the court ordered
5 the issuance of a summons and service on Dr. Aranas. (ECF No. 16.) The Attorney General's
6 Office accepted service for Dr. Aranas on July 24, 2019. (ECF No. 19.) Dr. Aranas filed his answer
7 on August 26, 2019. (ECF No. 24.)

8 Terri Keyser-Cooper, Esq., entered an appearance on behalf of Plaintiff and filed this
9 motion for leave to file the SAC on the same date. (ECF Nos. 26, 27.) The proposed SAC seeks
10 to add an Americans with Disabilities Act (ADA) claim against the Nevada Department of
11 Corrections (NDOC), revises the allegations of the Eighth Amendment claim against Dr. Aranas,
12 and dismisses all other defendants and claims.

13 Dr. Aranas argues that leave to amend should not be given with respect to the ADA claim
14 against NDOC because the ADA prohibits discrimination based on disability, but does not apply
15 to inadequate treatment for disability. Dr. Aranas does not otherwise oppose the motion for leave
16 to amend.

17 **II. DISCUSSION**

18 “A party may amend its pleading once as a matter of course within: (A) 21 days after
19 serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after
20 service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f),
21 whichever is earlier.” Fed. R. Civ. P. 15(a)(1)(A), (B). Otherwise, a party must seek the opposing
22 party's written consent or leave of court to amend a pleading. Fed. R. Civ. P. 15(a)(2).

1 “The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2).
2 Leave to amend need not be given where amendment: “(1) prejudices the opposing party; (2) is
3 sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile.” *Amerisource Bergen*
4 *Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (citation omitted).

5 The court finds that leave to amend is proper under Federal Rule of Civil Procedure
6 15(a)(2); however, the court will now review the proposed SAC to determine whether amendment
7 would be futile in any regard.

8 Preliminarily, the court notes that Dr. Aranas does not oppose Plaintiff's motion for leave
9 to amend insofar as the Eighth Amendment claim against him is concerned; therefore, the court
10 will allow the amendment in that regard. The court will now turn to whether leave should be given
11 to assert the ADA claim against NDOC.

12 "Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled
13 individuals." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001). "To effectuate its sweeping
14 purpose, the ADA forbids discrimination against disabled individuals in major areas of public life,
15 among them employment (Title I of the Act), public services (Title II), and public accommodations
16 (Title III)." *Id.*

17 If a plaintiff seeks to state a claim under Title II of the ADA, he or she must allege facts
18 showing that: (1) he or she is a qualified individual with a disability as the term is defined under
19 the ADA; (2) he or she was excluded from participation in or denied the benefits of the services,
20 programs, or activities or subject to discrimination by a public entity (which includes any State or
21 local government, department, agency, special purpose district or other instrumentality of a State
22 or States or local government); and (3) the exclusion, denial of benefits, or discrimination was by
23 reason of the disability. *See* 42 U.S.C. § § 12131, 12132.

1 The Supreme Court has confirmed that state prisons qualify as a public entity under Title II
2 of the ADA. *See United States v. Georgia*, 546 U.S. 151, 154 (2006) (citation omitted).

3 The proposed SAC alleges that Plaintiff is a qualified individual with a disability because
4 he is blind in one eye, but has never learned to compensate for that vision loss. He avers that he
5 was subject to discrimination by NDOC based on his disability because NDOC failed to
6 accommodate his reasonable request for a modification of its policies to allow him to see Dr. Hong,
7 a specialist recommended by Dr. Fischer, after nearly 20 years of having surgery recommended
8 for him and being denied the surgery based on NDOC policies. He alleges that this discrimination,
9 failure to accommodate and request for modification of NDOC's policies was intentional.

10 Dr. Aranas opposes Plaintiff's motion to amend to add an ADA claim against NDOC on
11 the basis that Plaintiff's ADA claim is really based on the failure to provide him with alleged
12 recommended medical treatment, which Dr. Aranas claims is actionable under the Eighth
13 Amendment, but not the ADA. Dr. Aranas relies on the following authority: *Simmons v. Navajo*
14 *County, Ariz.*, 609 F.3d 1011, 1012 (9th Cir. 2010), *overruled on other grounds by Castro v. City*
15 *of L.A.*, 833 F.3d 1060 (9th Cir. 2016) (en banc); *Marlor v. Madison County Idaho*, 50 Fed.Appx.
16 872, 874 (9th Cir. 2002); *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996); *Banda v. Doe*,
17 2:19-cv-00095-RFB-CWH, 2019 WL 3936660 (D. Nev. Aug. 19, 2019); *Sutton v. Nevada*, 3:19-
18 cv-00268-MMD-WGC, 2019 WL 3939061 (D. Nev. July 30, 2019).

19 In his reply, Plaintiff asserts that he has alleged he is a qualified individual with a disability,
20 i.e., blindness in one eye where he had not learned to compensate for his vision problem. In
21 addition, he argues that he was discriminated against because his disability was not reasonably
22 accommodated when NDOC failed to modify its "one good eye" policy.

1 In *Simmons*, the court considered whether a pretrial detainee was excluded from outdoor
2 recreation because of his depression (which he claimed was a disability under the ADA). *Simmons*,
3 609 F.3d at 1021. The court concluded it was not because the denial of outdoor recreation was due
4 to a jail policy restricting inmate activities while an inmate is on suicide watch. *Id.* at 1021-22. The
5 court also determined that to the extent it was argued that the ADA was violated because the he
6 was deprived of programs to lessen his depression: "The ADA prohibits discrimination because of
7 disability, not inadequate treatment for disability." *Id.* at 1022 (citing *Bryant v. Madigan*, 84 F.3d
8 246, 249 (7th Cir. 1996)).

9 In *Marlor*, the plaintiff claimed that the jail violated the ADA by failing to provide him
10 with medical equipment (rubber crutch tips). In an unpublished decision, the Ninth Circuit held
11 that "[i]nadequate medical care does not provide a basis for an ADA claim unless medical services
12 are withheld *by reason of* a disability." 50 Fed. Appx. at 873 (citations omitted).

13 In *Banda*, District Judge Boulware issued a screening order. The plaintiff alleged that he
14 was diagnosed with a blood infection because the medical staff had not flushed his IV, and he was
15 not afforded the same care as others. *Banda*, 2019 WL 3936660, at *3. Judge Boulware concluded
16 Plaintiff did not state an ADA claim because he was asserting he received inadequate treatment.
17 *Id.*

18 In *Sutton*, the undersigned issued a report and recommendation after screening an IFP and
19 pro se complaint. This court concluded the plaintiff did not state an ADA claim because the alleged
20 failure to provide mental health treatment was not actionable under the ADA. *Sutton*, 2019
21 WL 3839061, at *6.

22 This case is distinguishable from those cited by Dr. Aranas. Here, unlike those cases,
23 Plaintiff not only alleges that he was denied recommended treatment, but also that he was

1 discriminated against when NDOC refused to modify its policies concerning prisoners with vision
2 problems affecting only one eye, and he seeks modification of those policies as relief.

3 Discrimination under the ADA includes a public entity's failure to "make reasonable
4 modifications in policies, practices, or procedures when the modifications are necessary to avoid
5 discrimination on the basis of disability, unless the public entity can demonstrate that making the
6 modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R.
7 § 35.130(b)(7); *see also Pierce v. County of Orange*, 526 F.3d 1190, 1214 n. 25 (9th Cir. 2007)
8 (because Congress authorized the Attorney General to promulgate regulations under the ADA, the
9 regulations are given legislative weight unless "arbitrary, capricious, or plainly contrary to the
10 statute.").

11 Accordingly, the court finds that Plaintiff states a plausible claim for relief against NDOC
12 under Title II of the ADA.

13 **III. CONCLUSION**

14 (1) Plaintiff's Motion for Leave to file SAC (ECF No. 27) is **GRANTED**, and Plaintiff
15 may proceed with the SAC;


16 (2) The Clerk shall **FILE** the SAC (ECF No. 27-2);

17 (3) The Attorney General's Office shall file a notice within **14 days** of the date of this Order
18 advising the court and Plaintiff's counsel whether it is accepting service of the SAC on behalf of
19 Dr. Aranas and NDOC. If service is not accepted on behalf of any defendant, the Attorney
20 General's Office shall serve Plaintiff's counsel with the last known address(es) for such
21 defendant(s). If the last known address is a post office box, the Attorney General's Office shall
22 attempt to obtain and provide the last known physical address. Plaintiff is reminded that service
23 must be perfected within 90 days of the date of this Order. If the Attorney General accepts service

1 for any defendant, such defendant(s) shall file and serve an answer or other response to the
2 complaint within **30 days** of the filing of the notice accepting service.

3 **IT IS SO ORDERED.**

4 Dated: November 13, 2019.

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6 William G. Cobb
7 United States Magistrate Judge
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